

✓ Internal Revenue Service

memorandum

CC:TL-R-566-86

Br3:FJElward

date: OCT 07 1986

to: District Counsel, Miami

from: Director, Tax Litigation Division

subject: [REDACTED]
[REDACTED]

Your memorandum of August 29, 1986, requested technical advice in the above case. The substance of this technical advice has already been informally provided to your Mr. Axman.

ISSUES

We believe the issue should be formulated as follows: does I.R.C. section 6426(d) constitute the exclusive period of limitation of claims for refunds of civil aircraft use tax, or is I.R.C. section 6511 applicable where the tax is paid after the expiration of the period provided in section 6426(d).

CONCLUSIONS

Section 6426(d) provides the exclusive period of limitations on aircraft use taxes. There is no exception for taxes paid after the expiration of such period. Although this may be due to a Congressional oversight, the language is clear. However, since the tax is an expired tax and there are substantial litigation hazards, we recommend settlement rather than trial of the issue.

FACTS

The most comprehensive and comprehensible statement of facts is contained in the Joint Discovery Report prepared for filing with the district court. A copy of the document is in the Legal File. The following summary is taken principally from the Joint Discovery Report, pages 2-4.

[REDACTED] Inc., (plaintiff or taxpayer), is a Florida corporation. During the relevant times, it owned [REDACTED] jet aircraft, which if used in the United States would subject the plaintiff to the aircraft use tax for the fiscal years ended [REDACTED] through [REDACTED].

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The plaintiff failed to file returns of aircraft use taxes. The Service, on February 8, 1984, assessed taxes, interest, and penalties of \$ [REDACTED], for fiscal [REDACTED]; \$ [REDACTED], for fiscal [REDACTED]; \$ [REDACTED], for fiscal [REDACTED]; and \$ [REDACTED], for fiscal [REDACTED]. Amounts in excess of the total assessments were paid on [REDACTED], and [REDACTED]. Presumably there additional payments were interest on the assessments. Delinquent civil aircraft use tax returns were filed for the fiscal years on [REDACTED]. Plaintiff paid an additional \$ [REDACTED] dollars for each fiscal year on [REDACTED]. On [REDACTED] the plaintiff filed claims for refunds of the amounts of tax, paid on [REDACTED] and [REDACTED]. The Service has not formally disallowed the above claims for refund.

It appears undisputed that the plaintiff used the jet airplanes exclusively in foreign commerce, and, absent limitations, would have had a nominal tax liability. The Department of Justice, by letter of August 12, 1986, strongly disagreed with the administrative position that section 6426 is the applicable limitation under the facts of this case and requested advice on the Service's current position with respect to the limitations issue.

ANALYSIS

Plaintiff, as a "significant user of taxable civil aircraft in foreign air commerce" could have elected to pay a tentative tax determined under IRC section 4493(b)(2) and pay the net tax imposed by I.R.C. section 4491, determined as of the close of the year, with a final return. However, it failed to file either tentative or timely final returns for the years.

In view of the formula of section 4493(b)(2), plaintiff would have owed only nominal aircraft use tax at the close of each fiscal year and could have avoided almost all of the additional assessments described above if it had filed timely tentative and final returns. However, had plaintiff overpaid the taxes with timely returns, it could only get refunds of the tax if it had filed claims for refund during the period from the close of the fiscal year to the following September 30, section 6426(d).

A National Office Technical Advice Memorandum, dated September 9, 1983, was issued with respect to the instant case. A copy of the Technical Advice was attached to your request. In sum, the conclusion reached was that section 6426 was the exclusive statute of limitations for aircraft use tax; therefore, the general statute of limitations, contained in section 6511, was inapplicable. Thus, although the plaintiff has overpaid its aircraft use tax it cannot now obtain a refund.

The Department of Justice, by letter of August 12, 1986, agreed that section 6426(d) would be the statute of limitations for refund of aircraft use tax, but only as to such tax paid with a timely tentative or final return. The Department of Justice reads section 6426(a) as restricting section 6426(d) to tax levied with a tentative or final return filed before the expiration of the section 6426(d) period, not payments made subsequent to the final return. The Department concludes that since there is no specific period of limitations applicable to this case, the claim for refund here is subject to the general period of limitations contained in section 6511 and was thus timely filed.

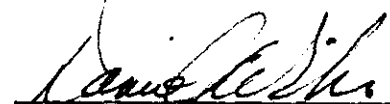
In our view, the Department of Justice's reading of section 6426(a) is not correct. Reading section 6426 as a whole, the result stated in the National Office Technical Advice is correct, but unfortunate.

Aside from the literal correctness of the National Office Technical Advice, we see extreme litigating hazards should the issue be presented to the district court. The "equities" militate in favor of granting a refund of the admittedly overpaid tax. There is a danger that the district court will "do layman's equity" and allow the refund despite the literal requirements of the Code. Thus the Government would be faced with an adverse decision with respect to an expired tax on possibly the worse fact pattern for a successful appeal. To avoid such a situation, we recommend settlement on the best available terms. This case should not be litigated. Should the government litigate this case there is the additional hazard

that the court might award attorneys fees under the Equal Access to Justice Act, 28 U.S.C. section 2412(d)(1)(A). This represents an additional litigation exposure and possibly and embarrassment.

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By:


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